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APPENDIX

Appendix A — Relevant Statutes And Regulations .. 1a

Respondent Northwest Kidney Centers respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case.

OPINIONS BELOW

This case was filed in the United States District Court for the Western District of Washington. On October 4, 1996, The Honorable Carolyn R. Dimmick granted Northwest Kidney Centers' motion to dismiss on the basis of *Noerr-Pennington* immunity (unpublished opinion; *see* CR 33). Kottle appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court ruling on June 18, 1998 (opinion published at 146 F.3d 1956 (9th Cir. 1998) and reprinted in Appendix A to the Petition for Writ of Certiorari).

STATUTES AND REGULATIONS INVOLVED

This case involves the Sherman Act, 15 U.S.C. §§ 1, 2 (set forth in Appendix E to the Petition for Writ of Certiorari), the Washington Consumer Protection Act, Revised Code of Washington ("RCW") 19.86.030 *et seq.*, and the State Health Planning and Resources Development Act, RCW 70.38.015 *et seq.* and accompanying regulations, Washington Administrative Code ("WAC") 246-310-010 *et. seq.* Excerpts of the Washington statutes and regulations cited by Respondent are contained in the Appendix to this brief.

STATEMENT OF THE CASE

I. The Nature of the Case.

Under the *Noerr-Pennington* doctrine, a party exercising its First Amendment right to petition the government does not violate the antitrust laws. Two courts below have reviewed the facts of this case and applied the *Noerr-Pennington* doctrine to determine

that Petitioner's Complaint did not state a claim for antitrust violations, because Respondent's conduct was protected petitioning activity.

Petitioner alleges that in 1991, an entity called King County Kidney Centers ("KCKC") filed certificate of need applications with the Washington State Department of Health ("Department") seeking authority to build two kidney dialysis centers. CR 1, at ¶ 3.3.[1] Under Washington law, dialysis centers cannot be built without permission from the Department, which must determine that there is a need for such a facility.

As an "affected person" under the statutory scheme establishing the certificate of need program, Northwest Kidney Centers participated in the Department's public hearings on KCKC's applications. At the hearing, Northwest Kidney Centers, along with other "affected persons," including King County Medical Blue Shield and the Health Care Purchasers Association, submitted information in opposition to KCKC's applications. CR 21. Ultimately, in March 1992, the Department determined not to grant the requested certificates of need to KCKC. *Id.* KCKC did not appeal administratively, as it could have done.

Four years later, Petitioner Sheldon P. Kottle, a physician who alleges he was associated with KCKC, *see* CR 1, at ¶ 3.3, filed this antitrust action claiming that Northwest Kidney Centers' petitioning activities before the Department violated state and federal antitrust laws.

II. The Proceedings Below.

Plaintiff's Complaint was filed on March 27, 1996, and served on Northwest Kidney Centers on May 24, 1996. On July 18,

1. References to "CR" and "SER" are references to the Clerk's Record and the Supplemental Excerpts of Record submitted with the briefing to the Ninth Circuit.

Northwest Kidney Centers moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on three grounds. First, the activities complained of were protected under the First Amendment right to petition the government, commonly referred to as *Noerr-Pennington* immunity. Second, Kottle's claims were barred by the four-year statute of limitations applicable to antitrust claims. Third, Kottle lacked antitrust standing to bring the action. CR 10; CR 11.

Kottle filed a memorandum in opposition to the motion to dismiss. On September 6, 1996, while the motion to dismiss was pending, Kottle moved to amend his complaint to add KCKC as a plaintiff. CR 24. Significantly, Kottle did *not* seek to amend his Complaint to add any further factual allegations in an effort to overcome the factual deficiencies identified by Northwest Kidney Centers' motion to dismiss.

At the time that Northwest Kidney Centers filed its motion to dismiss in July 1996, it also filed a motion to stay discovery pending the outcome of the motion to dismiss. (Kottle had served written discovery requests in June 1996.) SER Docket, entries 7 & 8. Kottle did not oppose Northwest Kidney Centers' motion to stay discovery. Accordingly, on August 2, 1996, the district court entered an order staying discovery until further notice. SER Docket, entry 14.

On October 4, 1996, the district court dismissed the Complaint and entered judgment for Northwest Kidney Centers. CR 33; CR 34. The Honorable Carolyn R. Dimmick found "plaintiff has not alleged with specificity, the type and degree of misrepresentations that would constitute a corruption of the core proceedings" so as to deprive Northwest Kidney Centers of *Noerr-Pennington* immunity. CR 33 at 10. The district court thus found it unnecessary to reach the second and third grounds offered in support of defendant's motion to dismiss. *Id.*

Kottle appealed to the Ninth Circuit, which affirmed the district court ruling in an opinion filed on June 18, 1998. The Ninth Circuit found that the allegations in Kottle's Complaint fall "far short of adequately alleging" that the certificate of need proceeding "was deprived of its legitimacy," as required to invoke the sham exception to *Noerr-Pennington* immunity. Pet. at A16. Kottle then filed a motion for reconsideration which was denied. He now seeks review by this Court of the Ninth Circuit's decision.

III. Factual Background.

A. *The Statutory Scheme for the Certificate of Need Program.*

The provision of kidney dialysis services in Washington is not left to market forces. Instead, it is highly regulated by the State of Washington through a certificate of need program, codified in the State Health Planning and Resources Development Act ("Health Planning Act"). No person or entity may build a new facility to provide dialysis services, or expand an existing facility, without approval from the State. RCW 70.38.105(3), (4)(a), (h).[2]

After receipt of a certificate of need (or "CON") application, the Department may conduct a public hearing. At such a hearing, any person may appear and, directly or through counsel, present oral and written arguments and evidence. An "affected person" also may appear and "conduct reasonable questioning of persons who make relevant factual allegations." WAC 246-310-180(5). Any health care facility that provides services similar to those sought to be provided by the applicant is considered an "affected person." WAC 246-310-010(2)(b).

The Health Planning Act sets forth specific criteria that the Department must consider in evaluating an application for a CON.

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2. Excerpts of the pertinent Washington statutes and regulations that were in effect at the relevant time are included in the Appendix to this brief.

These criteria include the need for the health services proposed, the availability of less costly or more effective alternatives, the financial feasibility of the proposal, and the probable impact on health care costs. RCW 70.38.115(2). In addition, the regulations governing the CON process for kidney disease treatment centers include a specific formula to be applied in calculating need. WAC 246-310-280.

Following a hearing, the Department must issue written findings. WAC 246-310-490. An applicant who has been denied a CON has the right to an adjudicative proceeding governed by the Washington Administrative Procedure Act. WAC 246-310-610.

B. *The CON Applications Filed by King County Kidney Center.*

Kottle alleges that in 1991, he "took formal steps to create a new kidney dialysis facility under the name King County Kidney Center (KCKC), with two locations in Seattle and Kirkland." CR 1, at ¶ 3.3. KCKC filed applications for two certificates of need with the Department of Health the same year. *Id.* Pursuant to its authority, the Department held hearings on the applications. Northwest Kidney Centers, as an "affected person," appeared before the Department and opposed KCKC's applications. Other entities, such as King County Medical Blue Shield and the Health Care Purchasers Association, submitted testimony opposing the KCKC applications as well. CR 21, at Ex. C, p. 10.

Ultimately, in two letters dated March 30, 1992, the Department denied KCKC's applications. CR 1, at ¶ 3.6; CR 21. Though KCKC could have appealed the Department's decision administratively, WAC 246-310-610, and ultimately to the courts, it did not do so.

C. *The Claims Made in the Complaint.*

The Complaint filed in this case alleges an unreasonable restraint of trade and attempted monopolization under Sections 1 and 2 of the Sherman Act and the analogous provisions of State law. CR 1, at ¶¶ 4.1, 4.2.

The facts provided in the Complaint as the basis for these antitrust claims are conclusory and lack specificity. Kottle complains that Northwest Kidney Centers "aggressively opposed Plaintiff's CON applications . . . with the intent of eliminating competition." CR 1, at ¶ 3.4. The Complaint alleges that when Northwest Kidney Centers opposed the applications, it made "false statements of fact and misrepresentations about KCKC" and about "the need for kidney dialysis services in the areas proposed to be served by KCKC and [Northwest Kidney Centers'] ability to meet the needs of King County residents with its then current capacity." CR 1, at ¶ 3.6. No specifics are provided, however, and none of the alleged false statements is described in the Complaint. The gravamen of the Complaint is simply that Northwest Kidney Centers opposed KCKC's applications and the CONs were denied. This offends Kottle, but it does not make out an antitrust violation, as two courts below now have found. Accordingly, Kottle's petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT.

The petition for a writ of certiorari should be denied for several reasons. First, both the district court and the Ninth Circuit reviewed Kottle's factual allegations and determined that they were not sufficient to deprive Respondent of *Noerr-Pennington* immunity for its petitioning activities. As a result, Kottle's antitrust claims were properly dismissed pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

Second, there is no true and direct conflict in the circuits on the scope of the "sham exception" to *Noerr-Pennington* immunity. The facts in the case to which Kottle points to establish the alleged conflict, *St. Joseph's Hospital, Inc. v. Hospital Corporation of America*, 795 F.2d 948 (11th Cir. 1986), are opaque at best, and the decision cannot fairly be said to be in conflict with the decision of the Ninth Circuit here. Moreover, *St. Joseph's* and the other cases on which Kottle relies were decided before this Court's decisions in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), which give shape to the sham exception.

Third, when Kottle moved to amend the Complaint to add KCKC as a plaintiff he passed up the opportunity to amend to add facts that might overcome the deficiencies identified by Northwest Kidney Centers in its then-pending motion to dismiss. As the Ninth Circuit found, his failure to seek leave to amend suggests Kottle had taken his "best shot." Pet. at A17, n.6. In addition, the lower courts properly took judicial notice of public records from the Department of Health certificate of need process. Thus, the courts had the opportunity to evaluate the Complaint with more information than was provided in the Complaint itself.

Finally, this case does not merit review because it could have been dismissed on the basis that the statute of limitations had run. Though the lower courts did not reach this issue, it provides an alternative basis for denying the petition because Respondent moved to dismiss on this basis as well as on the strength of *Noerr-Pennington* immunity.

II. *NOERR-PENNINGTON* IMMUNITY PROTECTS PETITIONING ACTIVITIES BEFORE THE GOVERNMENT.

This Court has repeatedly held that petitioning activities such as those alleged in the Complaint here are protected and cannot give rise to antitrust liability. The Court first addressed this issue in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, certain railroads engaged in an aggressive lobbying campaign to persuade the legislatures of several states to adopt legislation limiting competition from truckers. The Court held that such efforts to influence the legislative process are protected under the First Amendment to the Constitution, and thus are immune from antitrust liability. 365 U.S. at 137-38, 143-44.

The Court reached this result despite acknowledging that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business." *Id.* at 138. This anticompetitive motive, however, was irrelevant:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. *It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.* . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act.

Id. at 139 (emphasis added).

Four years later in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court extended the *Noerr* exception to attempts to influence governmental officials in the executive branch. Again, the Court held that "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

Ultimately, *Noerr-Pennington* immunity was extended to protect petitioning in proceedings before state and federal administrative agencies and courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). This protection applies to petitioning in opposition to a certificate of need before an administrative agency. *See Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 578-79 (6th Cir. 1986); *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1570 (10th Cir. 1991), *cert. denied*, 505 U.S. 1206 (1992).

III. THE NINTH CIRCUIT CORRECTLY FOUND THAT KOTTLE'S VAGUE ALLEGATIONS OF MISREPRESENTATION ARE INSUFFICIENT TO OVERCOME *NOERR–PENNINGTON* PROTECTION.

A. Petitioner Cannot Meet the Heightened Pleading Standard Required to Strip Respondent of *Noerr-Pennington* Immunity.

On a motion to dismiss, a court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). Petitioner, however, argues that some "special status" is accorded to antitrust complaints under which motions to dismiss are especially disfavored. Pet. at 14. In making this argument, Kottle has the matter exactly backwards. His Complaint seeks to attach antitrust liability to Northwest Kidney Centers for petitioning the government. A heightened pleading standard applies

to such a complaint. The Ninth Circuit has appropriately recognized that when the sufficiency of a complaint seeking damages for "conduct which is prima facie protected by the First Amendment" is at issue, "the danger that the mere pendency of the action will chill the exercise of First Amendment rights *requires more specific allegations than would otherwise be required.*" *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (emphasis added). In such a case,

> we require[ ] that the plaintiffs satisfy more than the usual 12(b)(6) standard, . . . "*a complaint must include allegations of the specific activities*" which bring the defendant's conduct into one of the exceptions to *Noerr-Pennington* protection. . . . *This heightened level of protection* accorded petitioning activity is necessary to avoid "a chilling effect on the exercise of this fundamental First Amendment right."

Oregon Natural Resources Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991) (quoting *Franchise Realty*, 542 F.2d at 1082) (emphasis added)); *compare* Fed. R. Civ. P. 9(b).

Simply alleging, as Kottle does in his Complaint, that Northwest Kidney Centers made "false statements of fact and misrepresentations," CR 1, at ¶ 3.6, is not enough to defeat a motion to dismiss under this standard:

> [T]he heightened pleading standard of *Franchise Realty* would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as "misrepresentations" by the other party. *See Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)

> ("[N]othing more is alleged than the use of false affidavits in the state suit. That, however, is a charge that can easily be leveled, and is thus insufficient by itself to overcome *Noerr-Pennington* immunity.").

Oregon Natural Resources Council, 944 F.2d at 536; *see Boone v. Redevelopment Agency*, 841 F.2d 886, 894 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988) ("[c]onclusory allegations are insufficient to strip [defendants] of *Noerr-Pennington* protection").

In judging the sufficiency of Kottle's Complaint in this case, the district court and the Ninth Circuit properly applied this heightened pleading standard by which a complaint must be examined when a party seeks to convert petitioning the government into the basis for an antitrust case. CR 33, at pp. 4-5; Pet. at A16-A17. Because Kottle did not meet this standard, this Court should not accept review of Kottle's claims.

B. Northwest Kidney Centers' Activities in Opposing KCKC's Certificate of Need Applications Were Protected by the First Amendment Right to Petition.

In his Complaint, Kottle charges that Northwest Kidney Centers "aggressively opposed Plaintiff's CON applications," and that defendant "acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County." CR 1, at ¶ 3.4. Petitioner charges that Northwest Kidney Centers' participation before the Department of Health was "intended to, and did, influence the Department to reject Plaintiff's application for a dialysis facility in King County." CR 1, at ¶ 3.6. Even if these allegations are accepted as true, as they must be on a motion to dismiss, they are legally insufficient to establish antitrust liability. The Sherman Act simply does not reach activities

by which "the people . . . freely inform the government of their wishes." *Noerr*, 365 U.S. at 137. Consequently, the petitioning activity of Northwest Kidney Centers before the Department of Health was prima facie protected activity that cannot form the basis for antitrust liability.

1. *Northwest Kidney Centers' Petitioning Activities Do Not Fall Within the Sham Exception to Noerr-Pennington Immunity.*

Kottle argues that he sufficiently pled facts within the sham exception to *Noerr-Pennington* so as to preclude dismissal of his Complaint. Pet. at 19-20. Kottle's discussion of the sham exception, however, is inconsistent with this Court's ruling in *Professional Real Estate* and those *Noerr-Pennington* cases decided since.

2. *The Sham Exception Is Narrow.*

The sham exception was first enunciated in *Noerr* and has since been refined by this Court on several occasions, most recently in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

Omni involved the efforts of a billboard advertising company to influence the enactment of a zoning ordinance that made it very difficult for the company's rivals to erect billboards of their own. In the ensuing antitrust action, plaintiff claimed that defendant engaged in sham petitioning before the city council. Plaintiff argued that the case involved governmental "corruption," and alleged the existence of a "secret anticompetitive agreement" between its rival and city officials under which city council members "received advantages." 499 U.S. at 367, 376.

The Court found for defendant, however, and rejected the claim of sham petitioning. "The 'sham' exception to Noerr

encompasses situations in which persons use the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon." 499 U.S. at 380 (emphasis in original). The Court explained:

> A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See California Motor Transport. . . . A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 496, 500, n.4, . . . not one "who 'genuinely seeks to achieve his government result, but does so *through improper means*,' " *id.* at 508, n.10 . . . (quoting Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n.5 (CA9 1987)).

499 U.S. at 380 (emphasis in original).

Thus, urging governmental action that will injure a rival does not amount to a sham if the injury will flow from the governmental action sought. This is true even when "improper means" are used in the petitioning. It is only when the petitioner seeks to harm its rival through abuse of the petitioning process that the petitioning may be a sham.

Most recently, in *Professional Real Estate*, 508 U.S. 49 (1993), the Court again affirmed that sham petitioning cannot occur when the petitioning at issue is invoked in a genuine attempt to influence governmental action. The Court went further and held that "an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." *Id.* at 60. The Court thus established a two-

part test for whether the sham exception applies in the context of litigation:

> First, [to be a sham] the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail.

508 U.S. at 60. In other words, to be "objectively baseless," "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." *Id.* at 62. As long as the litigant has "probable cause to institute legal proceedings," which is defined as a reasonable belief that there is a chance of success, the lawsuit cannot be a sham. *Id.* at 62-63 (citations omitted). Accordingly, a "winning lawsuit is by definition a reasonable effort at petitioning for redress and not a sham." *Id.* at 60 n.5. *See also FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 936 (Fed. Cir. 1995) ("Obviously, if the patentee is successful in his infringement action, his suit is not baseless, and it cannot be a sham.").

The Court in *Professional Real Estate* then explained the second prong of the sham exception:

> Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr* . . . , through the "use [of]

> the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon," *Omni* . . . .

508 U.S. at 60-61 (citation omitted) (emphasis in original).

In a footnote, the Court left open the question of whether misrepresentations can ever constitute a sham sufficient to take petitioning activity outside *Noerr* protection. 508 U.S. at 61 n.6. This issue was addressed by the Ninth Circuit in *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993), *cert. denied*, 513 U.S. 818 (1994), an important case on which the courts below relied (CR 33, at p. 9; Pet. at A9-A13), but which Kottle ignores completely. In that case, when Liberty Lake Investments sought to develop property, its plans were challenged (unsuccessfully) before governmental agencies and in the courts. Liberty Lake then filed an antitrust suit against its opponents, who in turn claimed *Noerr-Pennington* immunity. Liberty Lake argued that its opponents had engaged in unethical conduct amounting to "fraud and misrepresentation." 12 F.3d at 158. According to Liberty Lake, "abuse in the litigation process" would render petitioning conduct a sham without regard to *Professional Real Estate*'s two-part test. *Id.*

The Ninth Circuit noted that in footnote 6 of *Professional Real Estate*, this Court had reserved the question of whether fraud or other misrepresentations may amount to a "sham." *See Liberty Lake*, 12 F.3d at 158. The court held, however, that the Supreme Court's reservation of that question did not "obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Id.* at 159. The Court explained:

> As we read the Court's footnote 6, however, it does no more than reserve the issue of whether antitrust liability may be premised on a litigant's deceptive

> conduct which goes to the *core of a lawsuit's legitimacy*, such that it is not "genuine," either in the sense of "'having the reputed or apparent qualities or character'" (i.e., objectively "genuine") or being " 'sincerely and honestly felt or experienced' " (i.e., subjectively "genuine").

Id. at 158 (quoting *Professional Real Estate*, 508 U.S. at 61) (emphasis added); *see Amarel v. Connell*, 102 F.3d 1494, 1518-20 (9th Cir. 1996) (plaintiff failed to show that litigation and efforts to influence State Department officials were baseless and without probable cause). The Ninth Circuit affirmed the dismissal of the Complaint here because plaintiff's claims, even when accepted as true, simply fell far short of this standard: the conduct attributed to Northwest Kidney Centers did not "deprive the litigation [here, the underlying administrative proceeding] of its legitimacy." *Liberty Lake*, 12 F.3d at 159.

3. *Kottle's Description of the Sham Exception Is Incorrect and Leads Him to the Wrong Result.*

Kottle's discussion of the proper scope of the sham exception hopelessly jumbles together different concepts in a confused and inconsistent manner that ultimately leads him to the wrong result. Kottle argues that the two-part test for sham litigation recently articulated in *Professional Real Estate* has little application in the administrative adjudicatory setting. Pet. at 6-11. But his efforts to draw some distinction, for *Noerr-Pennington* purposes, between the "litigation" and "the adjudicatory process," misses the mark and ignores footnote 6 in *Professional Real Estate.*

The distinction Kottle perceives between "litigation" and the "adjudicatory process" does not exist in the relevant *Noerr-Pennington* case law. In *California Motor Transport Co. v. Trucking Unlimited*, this Court grouped together contested

proceedings before administrative agencies and the courts as "adjudicatory" proceedings, 404 U.S. 508, 512 (1972), and discussed the sham exception as having the same scope in all such proceedings. Thus, a contested proceeding before an administrative agency is one to which the two-part test enunciated in *Professional Real Estate* applies.[3]

4. *Kottle's Complaint Does Not Allege Specific Facts of Sham Petitioning by Northwest Kidney Centers.*

Kottle asserts that he has alleged false statements and misrepresentations in his Complaint sufficient to plead a sham. Pet. at 14-17. Yet the operative language in the Complaint asserts only that Northwest Kidney Centers:

- "aggressively opposed Plaintiff's CON applications using methods and means which were improper and or unlawful;"

- "made false statements of fact and misrepresentations about plaintiff and KCKC and encouraged others to do so;" and

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3. Since the decision in *Professional Real Estate*, several courts have applied the two-part test developed there in a non-litigation context. *See, e.g., Classic Communications, Inc. v. Rural Telephone Service Co.*, 956 F. Supp. 910 (D. Kan. 1997) (defendant's petitioning activities in connection with plaintiff's application to the city for a local telephone exchange franchise analyzed under the sham exception set forth in *Professional Real Estate*); *EnviroSource, Inc. v. Horsehead Resource Development Co.*, 1996-2 Trade Cas. (CCH) ¶ 71,492 (S.D.N.Y. 1996) (*Professional Real Estate* test for sham exception applies to defendant's activities in opposing plaintiff's delisting petition before the EPA); *Fischer Sand and Aggregate Co. v. City of Lakeville*, 874 F. Supp. 957, 959 n.3 (D. Minn. 1994) ("[t]here is no reason to believe the test enunciated [in *Professional Real Estate*] does not apply equally to conduct allegedly intended to influence executive and legislative bodies").

> • made "false statements and misrepresentations [that] included, but were not limited to, the need for kidney dialysis services in the areas proposed to be served by KCKC and NWK's ability to meet the needs of King County residents with its then current capacity."

CR 1, at ¶¶ 3.4, 3.6. In his briefing below, and again here (Pet. at 15-17), Kottle argues that the specific misstatements can be found by contrasting statements made by Northwest Kidney Centers in 1992 when it opposed KCKC's CON applications with statements Northwest Kidney Centers made in 1995. In fact, there is no contradiction in these statements, and Kottle's reliance on them fails to add any specificity to the vague claims in the Complaint, let alone plead a corruption of the adjudicatory process so pervasive that it deprived that process of its legitimacy.

For example, Kottle alleges that in 1992, Northwest Kidney Centers *predicted* that the number of kidney dialysis stations needed through 1996 would be a certain number, and that in 1995, the actual number of existing stations was greater than Northwest Kidney Centers had predicted it would be three years earlier. Predictions, of course, are inherently speculative. Moreover, need calculations are made according to a set formula established by the Department. *See* WAC 246-310-280 (set forth in full in the Appendix to this brief). The need can change from year to year as a result of changing demographics, demand for service, and new technology.

Kottle was required to plead specific "deceptive conduct which goes to the *core of a lawsuit's legitimacy*." *Liberty Lake*, 12 F.3d at 158 (emphasis added). His briefs, filed long after he purposefully refused to avail himself of an opportunity to amend the Complaint, and which dispute the accuracy of a prediction

made years before the statements made in 1995, hardly rise to this standard.

Kottle also alleges Northwest Kidney Centers "planned the identical center they opposed as 'unnecessary.' " Pet. at 16. This is essentially the same argument addressed above. The fact that Northwest Kidney Centers applied in 1995 to build kidney dialysis stations in the area where Kottle had proposed to build them three years earlier, does not suggest there was a need for those stations three years earlier, or that Northwest Kidney Centers must have "presented false data" back in 1992.

Kottle's other allegations regarding Northwest Kidney Centers' conduct in petitioning the Department (Fet. at 16-17), similarly are lacking in support and in significance to the CON process. Kottle takes out of context and misunderstands the data regarding home dialysis, fails to comprehend the difference between the "cost" of a health care facility and "charges" for healthcare services, and misstates the law on ex parte contacts with the Department. *See* WAC 246-310-190 (*See* Pet. at E4). Northwest Kidney Centers' contacts with the Department had to do with matters other than Kottle's CON applications and they occurred, by Kottle's own admission in his reply brief to the Ninth Circuit, at or before the public hearing. Such contacts do not violate the Department's regulations, which only prohibit contacts about a specific application after the "conclusion of a public hearing." *Id.*

Conspicuously lacking from Kottle's Complaint and Petition are specific allegations that allege "knowing fraud" or "intentional misrepresentations" which, if proven, would show "deceptive conduct which goes to the core of a lawsuit's legitimacy, such that it is not 'genuine,' " as described by the Ninth Circuit in *Liberty Lake*, 12 F.3d at 159, and in this case, *Kottle,* 146 F.3d 1056 (9th Cir. 1998), building on footnote 6 in *Professional Real Estate.* Kottle does not claim that he was deprived of the opportunity to

present his application, statistical information, and arguments to the Department. He does not allege facts that would show that the "core" of the administrative proceedings before the Department of Health lost their "legitimacy," or were corrupted as a result of Northwest Kidney Centers' alleged misstatements. Instead, Kottle simply complains that Northwest Kidney Centers presented a different opinion than he did to the Department on whether there was a need for the services KCKC offered to provide. These are ultimately matters of opinion and the Department has its own detailed formula for determining need. *See* WAC 246-310-280. That one party believes the other is wrong does not deprive the opponent of immunity for petitioning the government.

A complaint that fails to allege the petitioning involved knowingly false statements, and that "fails to provide *specific allegations* that would when proven establish the knowing falsity of the statements," cannot " 'strip [activities] of their *Noerr-Pennington* protection.' " *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 957 (S.D. Cal. 1996) (quoting *Boone v. Redevelopment Agency*, 841 F.2d at 886) (emphasis added); *see Music Center v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995) ("antitrust claims based solely on broad and indistinct allegations of misrepresentation and 'sham litigation' " were not allowed to reach discovery). As the lower courts correctly found, Kottle does not provide specific facts that show how Northwest Kidney Centers' alleged misrepresentations went to the "core" of the "legitimacy" of the proceedings before the Department. Without such allegations, Kottle cannot deprive Northwest Kidney Centers of its First Amendment right to petition the government.

IV. CASES ADDRESSING THE SUFFICIENCY OF ALLEGATIONS IN THE CONTEXT OF *NOERR-PENNINGTON* IMMUNITY ARE FACT SPECIFIC AND THERE IS NO CLEAR CONFLICT IN THE CIRCUITS.

Petitioner relies primarily on *St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986), to argue that this Court should accept review to resolve a split in the circuits. The claimed split in the circuits is illusory. The Eleventh Circuit's opinion in *St. Joseph's* gives scant details of the conduct that was alleged to fall within the sham exception to *Noerr-Pennington*. As a result the case provides little guidance on when allegations are sufficient to overcome *Noerr-Pennington* immunity.

In *St. Joseph's*, plaintiff (St. Joseph's) filed an application for a certificate of need to enable it to expand its cardiac care services to include cardiac surgical services. *Id.* at 952. Defendant Memorial Medical Center ("Memorial") opposed the CON application asserting that it had the capacity to perform 1500 open heart procedures per year, which far exceeded the requirements of the region. *Id.*

Prior to issuing a decision on the CON, the administrative body charged with such decisions adopted a new cardiac surgery rule. Finding that the availability and accessibility of current cardiac surgery services fulfilled the new requirements, the administrative agency denied St. Joseph's CON application. *Id.* St. Joseph's appealed the denial to a Review Board (something Kottle did not do in this case), and Memorial then requested and was granted the right to intervene. *Id.* As soon as Memorial was allowed to intervene, "it began a course of conduct designed to delay the proceedings." *Id.* From that point on, the administrative and court proceedings arising from St. Joseph's CON application became increasingly complicated. The Review Board held that St. Joseph's had shown a need for additional cardiac services, but

the new cardiac surgery rule prohibited it from issuing a CON. *Id.* at 953. The Georgia Court of Appeals disagreed and affirmed the review Board's finding that the need for additional services had been shown. *Id.* During all of these proceedings, Memorial attempted to get the case dismissed. Thus, before the final decision on the CON application, St. Joseph's filed suit against Memorial alleging violations of the Sherman Act resulting from Memorial's submission of false information to the administrative agency considering the CON application. *Id.*

In a short discussion, the Eleventh Circuit simply stated:

> In order to find that a situation falls within an exception to a general rule, it must first be clear that the general rule itself is applicable. The plaintiff here has alleged misrepresentations before a governmental agency. When a governmental agency such as SHPA is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity.

Id. at 955. This is the extent of the Eleventh Circuit's analysis regarding the alleged misrepresentations in that case. The opinion provides no detail as to what the misrepresentations were, nor how detailed the allegations of misrepresentation were in the complaint. Not every misrepresentation, no matter how minor, serves to strip *Noerr-Pennington* protection from otherwise legitimate petitioning activities, and the Eleventh Circuit's opinion provides no guidance as to how to draw this line. In the absence of these facts it is impossible to claim that *St. Joseph's* is at odds with the Ninth Circuit's opinion here.

Likewise, the decisions Kottle cites from the Fourth Circuit and District of Columbia Circuit do not conflict with the Ninth

Circuit's decision. In *Israel v. Baxter Lab., Inc.*, 466 F.2d 272 (D.C. Cir. 1972), plaintiff, a pharmaceutical company, alleged that defendants, two competitors and an FDA official, conspired to keep plaintiff's drug from being approved by the FDA. Specifically, plaintiff alleged that they

> carried out this conspiracy by suppressing, concealing and misconstruing information concerning the two drugs before the FDA; by arranging for the employment as a consultant to the FDA of a medical doctor who had a financial interest in Baxter, which was seeking approval of its own . . . drug . . . ; by applying an unfair standard in judging [the drug]; and by misrepresenting the safety and efficacy of [the drug].

Id. at 274. These allegations, unlike Kottle's, were very specific and alleged a conspiracy which, if true, would have deprived the underlying proceeding of its legitimacy and rendered it a sham.

Similarly, plaintiff in *Hospital Building Co. v. Trustees of the Rex Hospital Corp.*, 691 F.2d 678, 687 (4th Cir. 1982), *cert. denied*, 464 U.S. 890 (1983), alleged a complicated web of conspiracy involving government officials, including the chairman of the Central Planning Council and an assistant attorney general. As a result, there was evidence that the process itself had been abused in a way that prevented the plaintiff from gaining meaningful access to the administrative process. The Fourth Circuit was cautious, however, about the scope of the sham exception and expressly rejected the lower court's jury instruction that "conduct in abuse of the adjudicatory or administrative process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws." *Id.* at 687-88. This and other such broad jury instructions were

"erroneous in light of *California Motor Transport*, which extends *Noerr-Pennington* immunity to the adjudicatory setting." *Id.* at 688. The court also ruled that the alleged misrepresentations must be made with the requisite intent to abuse the administrative process before they fall within the sham exception. *Id.* This holding is consistent with the Ninth Circuit's ruling in this case and in *Liberty Lake*. Thus, *Hospital Building Co.* does not support Kottle's argument that Supreme Court review is needed to resolve a conflict in the circuits.

In short, each case alleging misrepresentations in the administrative process turns on its own facts and the decisions do not conflict with the Ninth Circuit's decision here. Moreover, these cases are over a decade old and precede this Court's decision in *Professional Real Estate*, which was the basis for the Ninth Circuit's decisions in *Liberty Lake* and this case. Accordingly, there is no true conflict in the circuits and this Court should not issue a petition for a writ of certiorari to review the Ninth Circuit's decision.

V. PETITIONER NEVER ATTEMPTED TO AMEND HIS COMPLAINT TO CORRECT THE DEFICIENCIES IN HIS ALLEGATIONS.

Kottle's Complaint implicates the *Noerr-Pennington* doctrine: he complains of Northwest Kidney Centers' conduct in petitioning the government. Northwest Kidney Centers thus moved to dismiss the Complaint on the basis of *Noerr-Pennington* immunity. Kottle, however, made no effort to amend his Complaint to flesh out the vague and conclusory allegations. Fed. R. Civ. P. 15 provides that leave to amend "shall be freely given when justice so requires." Kottle did not seek to take advantage of that rule to provide specific information regarding the alleged misrepresentations and false statements in the petitioning. Nor did he oppose Northwest Kidney Centers' motion to stay discovery. As the Ninth Circuit correctly

concluded, Kottle took his "best shot" and failed to plead sufficient facts to overcome *Noerr-Pennington* protection. Under these circumstances, the petition for a writ of certiorari should be denied.

This case also fails to merit review, because the lower courts looked carefully at not only the Complaint, but also the public records from the CON process. On a motion to dismiss, courts may take judicial notice of public records outside the pleadings. *See MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Thus, the lower courts had ample evidence from which to judge the sufficiency of the allegations in the Complaint and their ability to overcome *Noerr-Pennington* immunity.

VI. ALTERNATIVELY, KOTTLE'S COMPLAINT CAN BE DISMISSED ON THE GROUND THAT HIS CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

This action was filed on March 27, 1996. The statute of limitations for claims under the federal antitrust laws and Washington Consumer Protection Act is four years. 15 U.S.C.A. § 15b (1997); RCW 19.86.120. The only date given in the Complaint for any of the actions is 1991. *See* CR 1, at ¶ 3.3. In the district court, Kottle claimed "the earliest date" on which his "antitrust injury arose" was March 30, 1992—the date on which the Department of Health denied KCKC's certificate of need applications. CR 17 at p. 7. But that is not a date on which Northwest Kidney Centers took any action that led to Kottle's alleged injury, and therefore it is not the date from which the statute began to run.

The statute of limitations on an antitrust claim begins to run on the date of the defendant's last overt act. *See Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987). The act

of an independent governmental body, such as the Department of Health, is not an overt act of defendant Northwest Kidney Centers. *Cf. Pace*, 813 F.2d at 239 (normal course of adjudication does not constitute overt act by defendant). Thus, the statute of limitations is not tolled with respect to a defendant's act pending the outcome of a proceeding. *See id.*; *Lender's Service, Inc. v. Dayton Bar Assoc'n*, 758 F. Supp. 429 (S.D. Ohio 1991). Kottle has failed to allege that Northwest Kidney Centers took any overt act that caused him harm after March 27, 1992. Accordingly, his claims are time-barred and the complaint could have been dismissed on this alternative ground. For this additional reason, the Court should deny the Petition for Writ of Certiorari. *See Gemtel Corp. v. Community Redevelopment Agency of the City of Los Angeles*, 23 F.3d 1542, 1546 (9th Cir. 1994) (court may affirm lower court's dismissal on any ground supported by the record).

CONCLUSION

For the foregoing reasons, Northwest Kidney Centers respectfully requests that the Court deny Kottle's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES AND REGULATIONS

RCW 70.38.105. Health services and facilities requiring certificate of need — Fees

(1) The department is authorized and directed to implement the certificate of need program in this state pursuant to the provisions of this chapter.

(2) There shall be a state certificate of need program which is administered consistent with the requirements of federal law as necessary to the receipt of federal funds by the state.

(3) No person shall engage in any undertaking which is subject to certificate of need review under subsection (4) of this section without first having received from the department either a certificate of need or an exception granted in accordance with this chapter.

(4) The following shall be subject to certificate of need review under this chapter:

(a) The construction, development, or other establishment of a new health care facility;

* * *

(h) Any increase in the number of dialysis stations in a kidney disease center.

* * *

Appendix A

RCW 70.38.115. Certificates of need — Procedures — Rules — Criteria for review — Conditional certificates of need — Concurrent review — Review periods — Hearing — Adjudicative proceeding — Amended certificates of need

(1) Certificates of need shall be issued, denied, suspended, or revoked by the designee of the secretary in accord with the provisions of this chapter and rules of the department which establish review procedures and criteria for the certificate of need program.

(2) Criteria for the review of certificate of need applications, except as provided in subsection (3) of this section for health maintenance organizations, shall include but not be limited to consideration of the following:

(a) Until June 30, 1990, the relationship of the health services being reviewed to the applicable health plans;

(b) The need that the population served or to be served by such services has for such services;

(c) The availability of less costly or more effective alternative methods of providing such services;

(d) The financial feasibility and the probable impact of the proposal on the cost of and charges for providing health services in the community to be served;

* * *

Appendix A

WAC 246-310-010 Definitions.

* * *

(2) "Affected persons" means:

(a) The applicant;

(b) Health care facilities and health maintenance organizations providing services similar to the services under review and located in the health service area;

(c) Third-party payers reimbursing health care facilities in the health service area;

(d) Any agency establishing rates for health care facilities and health maintenance organizations in the health service area where the proposed project is to be located;

(e) Health care facilities and health maintenance organizations which, in the twelve months prior to receipt of the application, have submitted a letter of intent to provide similar services;

(f) Any person residing within the geographic area to be served by the applicant; and

(g) Any person regularly using health care facilities within the geographic area to be served by the applicant.

* * *

Appendix A

WAC 246-310-180 Public hearings.

(1) "Opportunity for a public hearing," as used in this section, shall mean a public hearing will be conducted if a valid request for such a hearing has been submitted by one or more affected persons.

(2) The department shall provide opportunity to affected persons for a public hearing on:

(a) A certificate of need application which is under review, unless the application is being reviewed according to the emergency or expedited review processes; . . .

* * *

(5) In a public hearing on a certificate of need application or on a proposed withdrawal of a certificate of need, any person shall have the right to be represented by counsel and to present oral or written arguments and evidence relevant to the matter which is the subject of the hearing. Any person affected by the matter may conduct reasonable questioning of persons who make relevant factual allegations.

Appendix A

WAC 246-310-280 Kidney disease treatment centers.

(1) To receive approval, a kidney disease treatment center must meet the following standards in addition to applicable review criteria in WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240.

(2) End stage renal disease planning areas shall be health service areas. The health service areas are as follows:

(a) Health service Area I includes Clallam, Jefferson, San Juan Island, Kitsap, Pierce, King, Snohomish, Skagit, and Whatcom counties.

(b) Health service Area II includes Thurston, Mason, Grays Harbor, Pacific, Wahkiakum, Lewis, Cowlitz, Clark, Skamania, and Klickitat counties.

(c) Health service Area III includes Okanogan, Chelan, Douglas, Grant, Kittitas, Yakima, Benton, and Franklin counties.

(d) Health service Area IV includes Ferry, Stevens, Pend Oreille, Lincoln, Spokane, Adams, Whitman, Walla Walla, Columbia, Garfield, and Asotin Counties.

(3) The maximum number of dialysis stations needed in an end stage renal disease planning area shall be determined using the following data:

(a) Utilization of a dialysis station or a center.

(i) One hundred percent utilization equals twelve dialyses per week.

Appendix A

(ii) Eighty percent utilization equals 9.6 dialyses per week.

(iii) When determining the utilization of an existing center each station on which at least six patients have been self/home trained annually shall be deducted from the approved stations.

(iv) When determining the utilization of an existing center, the utilization rate may be reduced to seventy-five percent and seventy percent in facilities with ten percent and twenty percent peritoneal dialysis patients respectively.

(b) At the time of the application, the most recent Washington state office of financial management population data.

(c) Historical data of the Northwest renal network.

(d) The health service area's most recent three-year average shall be used for incidence, death, transplant, and home training rates.

(4) The maximum number of dialysis stations projected as needed in an ESRD planning area shall be determined using the following methodology:

(a) Identify the number of incenter patients expected in the planning area in the year in which the application is submitted.

(i) Add expected new ESRD and re-entry cases per year.

(ii) Subtract expected ESRD patient deaths per year.

(iii) Subtract expected ESRD home training patients per year.

(iv) Subtract the number of expected functional transplants per year.

(b) Calculate the number of expected dialyses by multiplying the number of incenter patients by three treatments per week.

(c) Calculate the number of dialysis stations needed in the applicant's projected third full year of operation using eighty percent utilization.

(5) All kidney disease treatment centers within a reasonable driving time must be operating at an eighty percent utilization rate before additional stations are approved.

(6) New kidney disease treatment centers must reasonably project an eighty percent utilization rate by the third year of operation.

Appendix A

WAC 246-310-490 Written findings and actions on certificate of need applications.

(1) Written findings.

(a) The findings of the department's review of a certificate of need application shall be stated in writing and include the basis for the decision of the secretary's designee as to whether a certificate of need is to be issued or denied for the proposed project.

(b) In making its findings and taking action on a certificate of need application, the department shall use all criteria contained in chapter 246-310 WAC applicable to the proposed project.

* * *

Appendix A

WAC 246-310-610 Adjudicative proceeding.

(1) An applicant denied a certificate of need or a certificate holder whose certificate was suspended or revoked has the right to an adjudicative proceeding.

* * *

(3) The proceeding is governed by the Administrative Procedure Act (chapter 34.05 RCW), this chapter, and chapter 246-08 WAC. If a provision in this chapter conflicts with chapter 246-08 WAC, the provision in this chapter governs.